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The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 17

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte HARVEY L. RHOADES

Appeal No. 95-1857
Application 08/004,475¹

ON BRIEF

MAILED

JAN 23 1996

**PAT.&T.M. OFFICE
BOARD OF PATENT APPEALS
AND INTERFERENCES**

Before LYDDANE, MEISTER, McQUADE, *Administrative Patent Judges.*
MEISTER, *Administrative Patent Judge.*

DECISION ON APPEAL

Harvey I. Rhoades (the appellant) appeals from the final rejection of claims 2-4, 6-11, 18, 19 and 30-33, the only claims present in the application. We affirm-in-part.

The appellant's invention pertains to a protective glove which may be used by a baseball player to protect the hand and wrist areas when batting a baseball. Independent claim 30 is

¹ Application for patent filed January 19, 1993. According to applicant, the application is a continuation of Application 07/952,198, filed September 28, 1992, which is a continuation of Application 07/673,713, filed March 22, 1991.

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further illustrative of the appealed subject matter and a copy thereof, as it appears in the appendix to the appellant's brief, is appended to this opinion.

The references of record relied on by the examiner are:

Materia	3,149,839	Sep. 22, 1964
Jansson et al. (Jansson)	4,137,572	Feb. 06, 1979

The claims on appeal stand rejected in the following manner:²

I. Claims 2, 4, 9, 10, 11, 30 and 31 stand rejected under 35 U.S.C. 102(b) as being anticipated by Jansson.

II. Claims 2, 6, 18, 19 and 30-33 stand rejected under 35 U.S.C. 102(b) as being anticipated by Materia.

III. Claims 3 and 8 stand rejected under 35 U.S.C. 103 as being unpatentable over Materia.

IV. Claim 7 stands rejected under 35 U.S.C. 103 as being unpatentable over Materia in view of Jansson.

The examiner's rejections are explained on pages 3-6 of the answer. Rather than reiterate the arguments of the appellant and examiner in support of their respective positions, reference is made to the brief, reply brief and answer for the full exposition thereof.

² The final rejection of claims 9-11, 18 and 31 under 35 U.S.C. 112, second paragraph, has been expressly withdrawn by the examiner. (see answer, page 2)

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OPINION

We have carefully reviewed the appellant's invention as described in the specification, the claims, the prior art and the respective positions advanced by the appellant in the brief and reply brief and by the examiner in the answer. As a consequence of this review we will sustain the examiner's rejection of claims 2, 4, 9, 10, 11, 30 and 31 under 35 U.S.C. 102(b) as being anticipated by Jansson. We will not, however, sustain the examiner's rejections of (1) claims 2, 6, 18, 19 and 30-33 under 35 U.S.C. 102(b) as being anticipated by Materia, (2) claims 3 and 8 under 35 U.S.C. 103 based on Materia or (3) claim 7 under 35 U.S.C. 103 based on the combined disclosures of Materia and Jansson. Our reasons for these determinations follow.

Considering first the rejection under 35 U.S.C. 102(b) based on Jansson, we initially note that the appellant has not argued the merits of any particular claim apart from the others and, therefore, all claims stand or fall together with representative claim 30. *See In re Young*, 927 F.2d 588, 18 USPQ2d 1089 (Fed. Cir. 1991). It is the examiner's position that

[a]s shown in Figure 3, Jansson et al teaches wrist and hand protective means attached to a glove structure in order to protect wearer's hands from blows. The two protective means are spaced in order that the "glove can bend

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at the inner joints and the wrist." (See column 3, lines 57-58.) Therefore, the Jansson et al glove is specifically designed so as to not interfere with the flexibility of the wearer's wrist. The wristband of claim 31 is shown in Figure 3 of Jansson. (See particularly the lower side with the wristband shown in dotted lines.) It is inherent that the wristband would be flexible; otherwise the wearer would not be able to fasten it around this wrist. (see answer, pages 3 and 4)

In support of this position the answer also states that

the examiner agrees that wrist flexibility is critical in hitting a baseball. However, the examiner does not agree that the glove of Jansson et al would not allow for flexibility sufficient to hit a baseball. The appellant has stated that "the mechanics of hitting a hockey puck with a hockey stick are such that very little wrist action is required." The examiner disagrees. Wrist shots and snap shots in hockey are shots which require a great deal of wrist "snap" and, therefore, flexibility. Jansson et al specifically teaches at column 3, lines 55-58 that the glove construction has "bendable connections between the respective adjoining and relatively stiff parts of the glove, so that said glove can bend at the inner joints and wrist." Although the appellant believes that the construction of the Jansson et al glove would inherently prevent a wearer's wrist from flexing through a full range of motion, there is no supporting evidence. Specifically, Jansson et al teaches that the glove is flexible and general knowledge of hockey and the shots used therein would lead one to further believe that the glove is flexible. The examiner's position continues to be that the glove taught by Jansson et al has the ability to function as claimed and, therefore, the intended use recitations

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presented in the claims (baseball batting) do not act to define the claimed invention over Jansson et al. (see pages 6 and 7; citation omitted)

The appellant in argument urges that when hitting a baseball (other than mere bunting of the ball) it is important for the batter to generate "bat speed" and submits a declaration by Ruhle to support the contention that "the generation of enough bat speed to hit a baseball any substantial distance requires that a batter be able to freely flex his wrists through a full range of motion" (see brief, page 7). The appellant thereafter urges that the glove of Jansson is of a "bulky and relatively stiff construction" and thus lacks "the capabilities requisite" to satisfy the limitations of the claims. In response to the examiner's contention that the glove of Jansson inherently has the capability of functioning in the claimed manner, the appellant argues that

the protective strip 7 provided in the hockey glove disclosed by the Jansson et al. Reference would prevent a wearer's wrist from flexing through a full range of motion as is required to hit a baseball effectively. The stiff protective strip 7 is disclosed as being constructed of a hard and stiff plastic. The protective strip 7 extends from the top of the thumb up to the edge 8 of the cuff 2 (column 2, lines 35-39). As further stated at column 2 lines 42-45 of the Jansson et al reference, "The protective element consisting of the layers 5 and 6 and the protective strip 7 thus covers the whole length of the thumb, the thumb root and the wrist as well as part of the forearm."

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As a result of this stiff piece of material extending between the thumb and the forearm, the Jansson et al. glove would clearly impede the flexibility of the wrist of an individual wearing the glove. In fact, Appellant submits that the protective piece 7 would function similar to a splint, thereby immobilizing the thumb and wrist of an individual wearing the hockey glove.

Thus, while Appellant agrees that the Jansson et al. reference teaches a glove having "bendable connections", it is nevertheless evident that the hockey glove disclosed in the Jansson et al. reference does not disclose or teach a structure which is flexible so as to be capable of performing the functional limitations recited in claim 30. (see reply brief, pages 1 and 2)

We are unpersuaded by the appellant's arguments. As the examiner has correctly noted, Jansson expressly states that his glove can "bend at the inner joints and **wrist**, respectively" (see column 3, line 58; emphasis ours). We additionally believe that the examiner was correct in stating that "Jansson et al teaches that the glove is flexible and general knowledge of hockey and the shots used therein would lead one to further believe that the glove is flexible" (see answer, page 7). In fact, the appellant concedes that Jansson teaches "bendable connections," but nevertheless contends that the protective strip 7 "would prevent a wearer's wrist from flexing through a **full range of motion** as his required to hit a baseball effectively" (emphasis ours). This argument, however, is not commensurate with the scope of the claimed subject matter. Independent claim

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30 makes no reference to a "full range of motion" and only requires that the **hand protector** and the **wrist protector** (as distinguished from the entire glove) do "not impede the flexibility of the wrist." Stated differently, a "full range of motion" has not been set forth in representative claim 30 and the protective strip 7 of Jansson is a part of his thumb protector, and not a part of either the hand protector 21 or the wrist protector 22. In our view, there is a reasonable basis to conclude that neither the hand protector 21 nor the wrist protector 22 of Jansson "impede the flexibility of the wrist" as broadly claimed.

As to the appellant's contention that the glove of Jansson is not capable of being used to bat a baseball as claimed, there is no evidence of record to support such a contention and it is well settled that counsel's arguments in the brief cannot take the place of evidence. *See In re DeBlauwe*, 736 F.2d 699, 222 USPQ 191 (Fed. Cir. 1984) and *In re Pearson* 494 F.2d 1399, 181 USPQ 641 (CCPA 1974). While the appellant has provided a declaration by Ruhle, this declaration does not address Jansson. Instead, the declaration in paragraphs 3 and 4 broadly states

3. A key component of hitting a baseball with a baseball bat is the generation of bat speed. To generate enough bat speed to hit a baseball any substantial distance, a batter

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must be able to freely flex his wrists through a full range of motion when the batter is hitting the baseball.

4. A batter often wears a pair of batting gloves to enhance the grip on the bat. However, any glove or device worn by a batter which would impede the flexibility of the batter's wrists would, in my opinion, not be useful as a batting glove.

These statements are not commensurate in scope with representative claim 30 since there is no requirement therein that the ball be hit any particular distance or, as we have noted above, there is no limitation which requires the wrist to freely flex "through a full range of motion." Cf. *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971), *In re Tiffin*, 448 F.2d 791, 171 USPQ 294 (CCPA 1971), *In re Thompson*, 545 F.2d 1290, 192 USPQ 275 (CCPA 1976) and *In re Dill*, 604 F.2d 1356, 202 USPQ 805 (CCPA 1979).

In view of the foregoing, we will sustain the examiner's rejection of claims 2, 4, 9, 10, 11, 30 and 31 under 35 U.S.C. 102(b) as being anticipated by Jansson.

Turning now to the various rejections based on Materia, in each of these rejections the examiner has taken the position that the hand cover of Materia can be considered to extend "about" a user's hand inasmuch as the strap 50 "extends around the front of the hand." However, as the appellant has correctly

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argued in the reply brief, the strap 50 of Materia only extends around a small portion of the hand and does not "substantially cover the hand" as expressly required by independent claims 30 and 31. With respect to claim 7, we have carefully reviewed the reference to Jansson but find nothing therein which would overcome the deficiencies of Materia. This being the case, we will not sustain the examiner's rejections of (1) claims 2, 6, 18, 19 and 30-33 under 35 U.S.C. 102(b) based on Materia, (2) claims 3 and 8 under 35 U.S.C. 103 based on Materia or (3) claim 7 under 35 U.S.C. 103 based on the combined disclosures of Materia and Jansson.

In summary:

The examiner's rejection of claims 2, 4, 9, 10, 11, 30 and 31 based on the reference to Jansson is affirmed.

The examiner's rejections of claims 2, 3, 6-8, 18, 19, and 30-33 based on the reference to Materia are reversed.

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No time period for taking any subsequent action in
connection with this appeal may be extended under 37 CFR
1.136(a).

AFFIRMED-IN-PART

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WILLIAM E. LYDDANE)
Administrative Patent Judge)

James J. Meister
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APPENDIX

30. A protective batting glove adapted to be secured about an individual's hand and wrist when batting a baseball to protect a hand area and a wrist area of the individual from injury if hit thereon by the baseball, the protective glove comprising:

a flexible hand cover positionable about the hand of the individual so as to substantially cover the hand, the hand cover having a lower end;

hand protector means for protecting the hand area of the individual from injury when hit on the hand area with the baseball when batting the baseball, the hand protector means secured to the hand cover so that the hand protector means is positioned over the hand area of the individual when the hand cover is disposed about the hand of the individual; and

wrist protector means secured to the lower end of the hand cover for protecting the wrist area of the individual from injury when hit on the wrist area with the baseball when batting the baseball;

wherein the hand protector means and the wrist protector means are secured to the hand cover so as not to impede the flexibility of the wrist of the individual when batting the baseball.